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# DICTA

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# DICTA

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# DICTA

Vol. VII FEBRUARY, 1930 No. 4

## THE UNITED STATES AND THE WORLD COURT; REPORT OF THE ASSOCIATION'S COMMITTEE

*Hon. John H. Denison,*
*President of the Denver Bar Association.*

Dear President Denison:

Your Committee on the question of whether the United States should adhere to the Permanent Court of International Justice, through ratification by the Senate, of the act of President Hoover in directing the signing at Geneva of the Protocol of Adherence, the Protocol of the Statute of the Court, and the Protocol of Revision of the Statute, is now ready to report.

The conclusion of the Committee favors the ratification. The reasons follow:

The Permanent Court of International Justice, or, as it is more commonly known, the World Court, was chartered and organized in 1921, under an international Statute drafted in 1920, and subscribed to by many States in a document called the Protocol of Signature.

Since organization, the Court, composed of eminent judges, has been functioning steadily, has decided sixteen international cases, rendered sixteen advisory opinions, and has grown rapidly in world esteem.

The Court has jurisdiction, under Article XXXVI of the Statute,—

FIRST: Of all cases which the disputing States refer to it by special agreement, and all matters which their general treaties and conventions likewise provide shall be referred.

SECOND: Of certain classes of legal disputes, the submission of which, when arising, is agreed upon in advance at the time of subscribing to

the Protocol of Signature (the Protocol adopting the charter Statute of the Court), by electing to accept, although there is no obligation to elect, certain provisions of the Protocol imposing this submission. Many of the States, by their election, have accepted this compulsory jurisdiction,—others have not. The United States, if adhering, would adhere as a State of this latter class.

The Court is further empowered by Article XIV of the Covenant of the League of Nations, to render advisory opinions to and at the request of either the Council or the Assembly of the League of Nations upon any dispute or question thus requested, and after adopting appropriate rules, has been exercising this advisory function, although the Protocol of Signature has nothing to say about advisory opinions. The Protocol for the Revision of the Statute, is designed to effect in the Statute certain changes, among which are those supplying the advisory jurisdiction lacking in the older Statute, and also harmonizing the Statute with the Protocol of Adherence, which is the principal international agreement by which, if ratified by the Senate, the United States would enter the Court.

In view of the fact that for the time being at any rate, the United States has adopted the policy of co-operation with, rather than membership in, the League of Nations, the wisdom of adherence by this country to the World Court would seem to depend upon two questions:

(1) Whether the other States which are members of the Court have now complied with the reserved conditions upon which if accepted by the other members of the Court, our Senate declared in 1926 that it would be willing to see the United States adhere.

(2) Upon whether there is anything in the adherence to the Court, which, either through the Protocol of Adherence, or through the Covenant of the League of Nations, would subject the United States to the League.

## SENATE RESERVATIONS

These famous reservations are five in number:

The *first reservation* is to the effect that the adherence of the United States to the Court shall not involve any legal relation to the League of Nations, or the assumption of any obligations by the United States under the treaty of Versailles. While this reservation is not accepted by the Protocol of Adherence in specific language, it is accepted in the general

language of the Introduction and of Article I, relating to all five of the reservations.

The *second reservation* demands a right of participation by the United States in the election of the Judges who comprise the Court, these Judges now being elected by a concurring majority of the Council and of the Assembly of the League, voting separately. This demand is met specifically by Article II of the Protocol of Adherence, and under it the United States, although not a member of the League, would, for the purpose of electing Judges, have the same right to vote as if a member.

The *third reservation* contemplates that the determination of what share of the expenses of the Court should be borne by the United States shall be made by the Congress of the United States itself. Compliance with this reservation is to be found in the general language of acceptance in the Introduction of the Protocol of Adherence and in Article I.

In the *fourth reservation* the Senate stipulates that the United States be permitted at any time to withdraw its adherence to the Court, and that the charter Statute under which the Court was created, shall not be amended without the consent of the United States. The right of withdrawal is completely provided for in Article VIII of the Protocol of Adherence and the right to veto any amendment of the charter Statute is fully conceded by Article III.

The *fifth reservation* is the one which has given the most trouble. This reservation is to the effect that,—(1) the Court shall not render advisory opinions except publicly, after notice to all States belonging to the Court, and after public hearings or opportunity for public hearings is given to all States concerned, and also, that,—(2) the Court shall not, without the consent of the United States, entertain any request for an advisory opinion touching any dispute or question in which the United States has, or claims an interest.

Under the present governing laws of the Court, advisory opinions may be called for only by the Council or by the Assembly of the League of Nations, and not by individual States. The Court has rendered sixteen such opinions already. They are considered of great value to the States

belonging to the Court. They tend, among other things, to avert a crisis between States before it becomes acute. While advisory opinions, being advisory, are not binding, they nevertheless, carry great moral weight. To provide for the desired publicity has been easy enough, but to find a formula that would satisfy the United States in its desire to possess a veto power to prevent rendition of an advisory opinion on any matter in which the United States might have or claim an interest and at the same time not destroy wholly this useful function of the Court for the remaining States which do not ask for any similar veto power, has been a difficult problem.

Article IV of the Protocol of Adherence complies with the publicity demand by providing irrevocably what the rules of the Court already provided revocably, namely, that advisory opinions shall be rendered only in public session of the Court after notice and after opportunity to be heard publicly.

Article V of the Protocol goes even further in respect to the right of the United States to be heard as to advisory opinions than demanded by the Senate itself, for this Article provides that even before a request is made upon the Court for an advisory opinion, and while the proposed request is still pending in the Council or Assembly of the League, notice shall be given to the United States so that there may be an exchange of views between the United States and the Council or Assembly as the case may be, on the question of whether or not an interest of the United States would be affected by an advisory opinion on the subject matter of the proposed request.

In respect to the desire for a veto power, it may be said that most questions for which an advisory opinion would be sought probably would be questions in which the United States neither would have nor claim an interest. This has been true as to all sixteen of the advisory opinions thus far rendered. Again, if by chance the question involved in the proposed advisory opinion should happen to be one in which the United States has or claims an interest, the Government might be perfectly willing to have an advisory opinion rendered upon it, and even might join in the request. If, however, it should turn out that the United States not only has or claims to have an interest, but persists in its insistence that

no opinion should be rendered, then, as provided under Article V of the Protocol, the United States could exercise its expressly reserved power of withdrawal from the Court "without any imputation of unfriendliness or unwillingness to cooperate generally for peace and good will." Thus the formula by which the Protocol solves the problems of the fifth reservation is of such a nature that the Court could not, while the United States is a member of it, render an advisory opinion on any subject matter in which the United States either has or claims to have an interest. True, the Court could entertain the request and render the opinion after the United States had withdrawn. But to do this, in other words, for the Court to render an advisory opinion while the United States is not a member is, however, a function the Court is exercising already. Manifestly, then, the United States no more subjects itself to the influence of the advisory opinions by joining the Court than by remaining outside. Indeed, under membership, the subjection would be actually less, because membership in itself carries a greater opportunity of control to the State possessing it. Then, too, the universal desire to have the United States become a member of the Court may be depended upon, in the event we should join, to induce, in all probability, the other States not to press for an advisory opinion which the United States really would not want rendered.

In the Senate's Resolution of Adherence, and following the recital of the five reservations are a *couple* of *"understandings"* with which also it would be contemplated that the United States would be joining the Court. According to the first of these, recourse to the Court for the settlement of a difference between the United States and any other State, is to be had only through general or special treaties concluded between the parties in dispute. This is provided for already in the charter Statute of the Court. No State, on signing the Protocol of Signature, need subscribe to the Court's compulsory jurisdiction unless it wants to, although many States have done so. The United States contemplates subscribing only to the Court's voluntary jurisdiction, that is, the jurisdiction assented to voluntarily by the parties themselves through general or special treaty or agreement aside from that represented by any of the Protocols under consideration.

The other "understanding" which the Senate prescribed, was to the effect that adherence to the Court should not be construed as requiring the United States to depart from its traditional policy of not interfering with, or entangling itself in, the political questions of policy or internal administration of other States, or as implying a relinquishment by the United States of its traditional attitude toward purely American questions. There is nothing in the Protocol of Adherence implying in the slightest degree a departure either from the policy or the attitude mentioned, since under the Protocol the United States could not be obliged to submit to the Court any dispute with another State unless electing to do so, and since it could veto the rendition even of an advisory opinion while a member of the Court.

## THE COURT AND THE LEAGUE OF NATIONS

Since the present policy of the United States is to cooperate voluntarily with the League rather than to be a member, it becomes important to inquire whether acceptance by the United States of membership in the Court would carry with it an agreement to be bound by the provisions of the Covenant of the League of Nations or would otherwise create a subjection of the United States to the League.

We have considered this inquiry and answer it in the negative.

While it was the League of Nations that under Article 14 of the Covenant brought about the organization of the Court, it was not the League that chartered it or gave it the breath of life. Both charter and life came directly from the many States which, while members of the League, nevertheless, acting apart from the League, separately and independently adopted the charter Statute and by so doing brought the Court into being.

The Court and the League are different entities or organizations. The decisions of the Court are not subject to the control of the League. Membership in the Court is not membership in the League or an acceptance of the provisions of the Covenant.

The relation between the Court and the League is, however, a close one. The common purpose of promoting international peace, together with the large degree of identity in membership, make it so. Fifty-four states are members of the League and fifty-two of them have signed the Protocol of Signature (the Charter Statute) of the Court and thirty-two of these have ratified it. There are now only two states belonging to the Court which do not belong to the League. The relation between Court and League is not one, however, which need deter the United States in the slightest degree from entering the Court.

The judges of the Court are elected by the Council and the Assembly of the League, and their salaries are a part of the budget of the League collected from the League's member States, but the United States, under the Protocol of Adherence, is to have in the election a voice equal to that of any other State and is to determine the amount of its own contribution to the expenses of the Court's maintenance.

We have noted already that the Council or Assembly may call for advisory opinions from the Court, although under the Protocol of Adherence the United States would have a veto power against the rendition of these opinions as long as the United States is a member of the Court.

In the examination of the relation between the Court and the League we now come to the subject of "sanctions", that is to those inducements which lead the States, when litigants before the Court, to abide by the Court's decree.

In the domestic or national courts of individual States the usual "sanction" or inducement for exacting obedience to the judgment of a court, is force—the force of the marshal or sheriff and his agents, or corresponding officers.

The only "sanction" found in the Protocols themselves by which to exact submission to the decree of the World Court is the moral obligation and the honor of the litigant State, whether a member of the League or not, which has submitted its case under an agreement to abide by the result. True, there is always the public opinion of the World—another powerful "sanction", but this lies outside of any agreement.

Although the Protocols contain no language calling for any "sanction" other than that of moral obligation yet, as to member States of the League it is clear that under Articles 13 and 16 of the League Covenant the members of the League contemplate the possible use of economic and even military "sanctions" under certain circumstances against one of their own number refusing to abide by the decision of the Court.

As to States which are not members of the League but are members of the Court, it is equally clear that no legal connection between the Court Protocols and the Covenant of the League would make any "sanction" of economic pressure or physical force applicable to the United States should the latter, upon adhering to the Court refuse to comply with a decision in a matter voluntarily submitted. This does not mean that the member States of the League have not, by Article 17 of the Covenant, agreed in such wise as to contemplate the possible use of economic and even military pressure against a non-member of the League which, on invitation of the Council, either refuses to submit a controversy to the Court or, having submitted it, refuses to abide by the decision but does the wholly unlikely thing of resorting to war instead; for there is an agreement among the League States to that effect. But it does mean, that the United States no more becomes a party to that agreement contained in the Covenant, no more assumes an obligation in respect thereto and no more subjects itself to the League by adhering to the Court under the Protocols before us, than by not adhering at all.

## WHY THE UNITED STATES SHOULD JOIN THE COURT

Since under the Protocol of Signature creating the Court, the United States, although not a party to that Protocol, is already eligible as a suitor or defendant before the Court, the question of why the United States should become a member is a fair one. Consideration proves that eligibility is not enough; that there should be actual membership.

The reasons for membership are two. The Court needs the United States. The United States, from the standpoint of enlightened self-interest, needs the Court. The process of diverting the thought and habit of the Nations from war to a judicial tribunal, as an agency for the settlement of interna-

tional conflict, is a slow one at best. The adherence of the United States means everything to the increasing strength and prestige of the Court and to its acceptance by all Nations as an agency for peace. As for the self-interest of the United States we are more likely, as a matter of human nature, to receive exact justice from the Court, as a litigant before it, if we appear as a member under the Protocols than if as a foreigner under the privilege of eligibility, no matter how graciously extended. Then too, international experience proves that wars come not only to the original disputants but also, as in the case of our own nation in the World War, to neutrals whose rights the original disputants violate. The World Court advanced in power and influence by our own membership in it, would have a strong tendency to minimize the frequency of the wars in which our country would be engaged, and, therefore, to increase the security of the life, opportunities and achievements of our people.

## RECOMMENDATIONS

For these reasons and in conclusion, the committee respectfully recommends to the Denver Bar Association the adoption of the attached Resolution for the adherence of the United States to the World Court.

Respectfully submitted,

GEORGE F. DUNKLEE,
JAMES H. PERSHING,
WILL SHAFROTH,
ROGER WOLCOTT,
L. WARD BANNISTER, *Chairman.*

## RESOLUTION OF THE DENVER BAR ASSOCIATION RELATING TO THE WORLD COURT

WHEREAS, the representative of the United States at Berne, acting under the direction of the President of the United States, has signed the Protocol of Signature of the Statute of the Permanent Court of International Justice, the Protocol of Adherence of the United States to said Protocol of Signature, and also has signed the Protocol of Revision of

the Statute referred to, all to the end that the United States may become a member of said Court, and

WHEREAS, the Permanent Court of International Justice, or World Court as it is more commonly called, is a great constructive agency for the maintenance of international peace, needs increasing support from the public opinion of the World and is needed in turn not only by other Nations but, from the standpoint of enlightened self-interest, by our own Nation as well, and

WHEREAS, the United States may now safely become a member of said Court under the Protocols referred to without either sacrifice of sovereignty or violation of traditional policies in international affairs,

NOW, THEREFORE, BE IT RESOLVED, that the Denver Bar Association earnestly favors the ratification of these Protocols by the Senate of the United States; that a copy of this Resolution, together with a copy of the report of the committee of the Association, which is hereby approved, be sent to the Senators representing Colorado at Washington and that a copy of the Resolution be sent to the President of the United States.*

*EDITOR'S NOTE: After due consideration the above report of the committee was approved and accepted by the Association and the resolution adopted as recommended.

# CONFLICTS BETWEEN STATE AND FEDERAL COURTS

*By Ernest B. Fowler of the Denver Bar*

THE existence and operation of two separate and distinct systems of courts throughout the nation gives rise to many interesting questions of jurisdiction, brings about many irritating conflicts and requires the application of broad principles of comity and equity to determine whether, under given circumstances, one system will interfere with the process or judgments of the other.

The courts of each state have full jurisdiction of all classes and kinds of cases known to the law, and with few exceptions, may carry through to conclusion any case instituted in them. In the vast majority of cases the jurisdiction of the state courts is exclusive. The federal courts covering the same territory have exclusive jurisdiction given them in certain specified cases enumerated in the constitution or statutes, such as controversies between states, between citizens of the United States and foreign states, citizens or subjects, questions of admiralty or bankruptcy. In other classes of cases, such as for instance where jurisdiction is based upon diversity of citizenship, the jurisdiction may not be exclusive. Each system has by virtue of constitutional or statutory provisions of the state legislatures or Congress, full power and authority, both at law and equity, to carry through any litigation once started to its final conclusion and to give full effect to any judgments or decrees which may be entered.

With such a dual system of courts operating in the same territory, it is inevitable that conflicts shall arise and that one system or the other give way.

As said by Chief Justice Taft in *Ponzi v. Fessenden,* 258 *U. S.* 255:

> "We live in the jurisdiction of two sovereignties, each having its own system of courts to declare and enforce its laws in common territory. It would be impossible for such courts to fulfil their respective functions without embarrassing conflict unless rules were adopted by them to avoid it. The people for whose benefit these two systems are maintained are deeply interested that each system shall be effective and unhindered in its vindication of its laws. The situation requires, therefore, not only definite rules fixing the powers of the

courts in cases of jurisdiction over the same persons and things in actual litigation, but also a spirit of reciprocal comity and mutual assistance to promote due and orderly procedure."

It is the purpose of this paper to discuss, in the short space available, a few of the principles which have been worked out and the rules established as a result of 137 years of experience under the two systems.

Congress at a very early date recognized that embarrassing situations and conflicts might arise and in 1793 the second Congress passed a statute which has been in force ever since, and unchanged, known sometimes as Section 720 of the Revised Statutes, or more recently as Section 265 of the Judicial Code, which provides:—

"Section 265. The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

This language is explicit and definite and if applied literally there could be no injunctions granted in any case by a federal court enjoining or staying proceedings in a state court, only except in the case of the one exception noted in the statute, namely, bankruptcy proceedings. In 1793 when this statute was passed, all courts of equity had a well recognized right, which had frequently been exercised, to issue writs of injunction to stay proceedings pending in court, to avoid multiplicity of suits, to enable a defendant to avail himself of equitable defenses or obtain some form of equitable relief, and a court of equity of one state or country could enjoin its own citizens from prosecuting suits in another state or country. Congress obviously intended by this statute to limit the powers of the federal courts which they have previously enjoyed.

The Supreme Court of the United States, in the recent case of *Smith v. Apple,* 264 *U. S.* 274, has said that this statute is not a jurisdictional statute but that it is a limitation on the equity powers of the federal court and effects the particular form of relief that may be decreed in the particular bill before the court.

But this section does not stand alone. Section 262 provides:—

"Section 262. * * * The Supreme Court, the Circuit Courts of Appeal, and the District Courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions and agreeable to the usages and principles of law."

So it has been frequently held that these various statutory provisions must be construed together in order to give them effect and to protect the federal jurisdiction which clearly exists in a large class of cases, for the federal courts have always had original cognizance of all suits of a civil nature, either at law or equity, arising under the constitution or laws of the United States, or where there is a controversy between citizens of different states. And if the federal court could not enjoin other proceedings under any circumstances, its powers would be seriously curtailed and its power to enforce its judgment and decrees be impaired in a most material aspect. The federal courts would find themselves powerless to prevent inroads on their jurisdiction made by state courts, and see their judgments or proceedings become lifeless and mere scraps of paper.

Consequently, it has been held that Section 265 must be construed along with the other statutory provisions, its broad language somewhat narrowed in its scope, and that no intention would be attributed to Congress to repeal a portion of the power expressly given to the federal courts. Accordingly, the statute has not been literally applied, and in unusual situations the federal courts have read into the statute other exceptions than the one expressly stated.

There are at least six classes of cases in which the federal courts will enjoin the activities of state courts, which have become well recognized.

I.

Probably the most familiar instance is where a suit, having been started in a state court, has been properly removed to the federal court. Upon removal the state court loses its jurisdiction and any further proceedings there would be void so the federal court will enjoin any further proceedings in the state court. If they did not do so, the right of removal would become a mere empty form. The federal courts early found it necessary to give relief in such cases in order to maintain their jurisdiction which had been expressly given them

by the removal statutes. Probably the best known case laying down this doctrine is *Madisonville Traction Company vs. St. Bernard Mining Co.,* 196 *U. S.* 239, 49 *L. ed.* 462.

II.

Another well settled class of cases is that where a federal court will enjoin the enforcement of a void judgment obtained in a state court, as for instance where the state court was without jurisdiction to enter the judgment. The argument has been advanced in this connection that the prohibition of Section 265 applies only to valid or legal proceedings of the state courts. The case of *Simon v. Southern Ry. Co.,* 236 *U. S.* 115, is an example of this classification, where the judgment was obtained in the state court without any notice to the defendant.

The federal court will likewise enjoin proceedings in a state court based on a void execution. *Sea Board Air Line v. Fowler,* 275 *Fed.* 239.

III.

Still another class of cases to which Section 265 does not apply is the enjoining by the federal courts of the enforcement of judgments obtained in a state court by fraud or sharp practice, such that it would be inequitable to enforce the judgment. In such cases, although the state court had jurisdiction to enter the judgment, still the plaintiff is denied the benefits and fruits of his efforts. Such a case was *Marshall v. Holmes,* 141 *U. S.* 589.

And injunctive relief has been granted where a judgment was obtained through accident or mistake. *National Surety Co. v. State Bank,* 120 *Fed.* 593.

As said in *Smith v. Apple,* 6 *Fed.* (*2nd*) 559:

> "In short, the national courts 'have the same jurisdiction and power to enjoin a judgment plaintiff from enforcing an unconscionable judgment of a state court, which has been procured by fraud, accident or mistake, that they have to restrain him from collecting a like judgment of a federal court'. National Surety Co. v. State Bank, 120 Fed. 593, 602.

Here in such cases it has been argued that the aggrieved party had an adequate remedy in the state courts which would protect him, or that he could appeal the case to a higher state court for relief. But the federal courts have held consistently that it is not sufficient that there be a remedy in a state court—

the remedy to be adequate must be in the federal court where the relief is prayed. See a decision of Judge Sanborn in the eighth Circuit,—*National Surety Co. v. State Bank,* 120 *Fed.* 593.

It has been argued that such a suit was in violation of the Constitution, and a denial of full faith and credit to the judicial proceedings of the state. But the courts have held that the relief in such cases does not interfere with the state proceeding, that the judgment is left in its full vigor, but the plaintiff is enjoined personally from enforcing the judgment, as the injunction acts only on the party, and not on the court; that the "proceedings" referred to in the statute have ripened into a judgment and are at an end, and that the suit of the plaintiff in the federal court is an entirely new and independent suit.

In the case of void judgments, it has been said they are completely nugatory and hence not a "proceeding" within the prohibition of Section 265.

But such arguments are obviously an attempt to get around and explain away the language of the statute. Jurisdiction of a court is not exhausted by the rendition of a judgment—it continues until the judgment is satisfied and the successful party is rewarded by getting what he started after—the fruits of a judgment. As a practical matter the proceedings of the state court are affected by the injunction, and its machinery is effectually blocked. If the proceeding sought to be enjoined is not before a court of a state, then it does not come within the prohibition of the statute and the federal court may clearly give relief. So bodies such as railroad or utility commissions, which act in a legislative or administrative capacity, may be enjoined, unless they are exercising purely judicial functions. See *Bacon v. Rutland R. R.* 232 *U. S.* 134. Close questions arise and nice distinctions are made in determining whether the body is acting in a legislative or judicial capacity.

## IV.

Another exception is found in the case of *U. S. v. Inaba,* 291 *Fed.* 416, where a federal court restrained a state court from disposing of certain crops in order that the federal government, as landlord under a lease, might collect rent due and

foreclose its landlord's lien,—an instance where the federal court protected the property of the government at the expense of the proceedings in the state court.

V.

Probably the most common instance of injunction occurs where the federal court first acquires jurisdiction over specific property and then enjoins a later proceeding affecting the *res* in a state court. Here the familiar rule is applied, which is not limited to conflicts between state and federal courts, that the first court to obtain jurisdiction of the *res* shall have exclusive jurisdiction until the controversy is concluded. The rule applies in suits to enforce liens, marshall assets, administer trusts, liquidate insolvent estates and similar cases.

As said in *Covell v. Heyman,* 111 *U. S.* 176:

> "When one takes into its jurisdiction a specific thing, that res is as much withdrawn from the judicial power of the other as if it had been carried physically into a different territorial sovereignty."

And the rule works both ways—if the state court first acquires jurisdiction over the *res,* then the federal court cannot give relief. The case of *Julian v. Central Trust Co.,* 193 *U. S.* 93, gives an example of this rule. A federal court had adjudicated a title and decreed a sale of specific property. A state court later attempted to attack this title and was enjoined by the federal court.

A distinction which some courts have failed to note must be made between proceedings *in personam* and *in rem.* If *in personam* only then there may be suits pending in both state and federal courts to obtain the same relief, going on independently without interference from the other, and although this may inconvenience the parties, it is a question merely of which court will first proceed to judgment—once the judgment is obtained, in either court, that court can then enjoin further proceedings in the other.

An interesting claim was made in a recent case where plaintiff, because of diversity of citizenship, saw fit to press his claim *in personam* in the federal court. When his opponent started a later suit in the state court and was showing ability to get speedy justice, the plaintiff sought to restrain him on the ground that he was being deprived of a constitutional

right to have his matter tried in the federal court. But the Supreme Court in *Kline v. Burke Const. Co.,* 43 *Sup. Ct. Rep.* 79, held that a right which may be given and taken away by Act of Congress cannot be protected as a constitutional right; that a plaintiff in an action *in personam* had no constitutional right to a trial in the federal court, and that the federal court would only protect its jurisdiction where a *res* is involved. There is clearly a multiplicity of suits over the same claim, but the courts have held that nevertheless the statute prevented the court from giving the usual equitable relief in such cases.

VI.

Where the petitioner is being restrained of his liberty by officials of a state under indictment or conviction for violation of a statute which is in violation of the federal constitution, the federal court will stay proceedings of the state court until it can decide the right to habeas corpus.

In *Ex Parte Royall,* 117 *U. S.* 242, it was held that under such circumstances the federal court would discharge the prisoner in advance of trial in the state court, where there were special circumstances requiring immediate action. In these habeas corpus cases Section 33 of the Federal Code is a further aid to the court, as it provides that pending the determination of the habeas corpus proceedings, any further proceedings in the state court are null and void.

VII.

Another well defined exception is found in cases where the federal court will enjoin the threatened enforcement of a criminal statute which is in violation of the federal constitution, where property rights are being destroyed or seriously impaired. In such cases it has been argued that the injunction against the Attorney General is a suit against the state and therefore in violation of the Eleventh Amendment to the Constitution. But it is now settled that such suits are not against the state, but against individuals charged with the administration of a state law, and if that law is unconstitutional, they have no justification for their activity. But here again, from a practical standpoint, the state has been interfered with—as the state can only act through its officers and agents, who are

subjected to the process of the federal court, the state has become a party defendant and is prevented from doing what it plans to do.

The case of *Ex Parte Young,* 209 *U. S.* 123, is the leading authority for this exception. Here the Attorney General of the State was threatening to enforce an unconstitutional statute and he was enjoined from proceeding under the statute.

But injunction will not lie from a federal court to restrain a criminal proceeding actually pending in a state court although there is a definite threat of a multiplicity of future proceedings and a forfeiture of a corporate charter, as determined in the case of *Foster Cline v. Frink Dairy Co.,* 274 *U. S.* 445; 71 *L. ed.* 1146, reversing 9 *Fed.* 2nd. 176 on this point.

In an early case, *Riggs v. Johnson,* 73 *U. S.* 6, it was sanguinely asserted that the respective spheres of action of the state and federal courts were as clearly marked as if the line of division between them "was traced by landmarks and monuments visible to the eye", and that the proceedings of one was beyond the reach of the other. But the authorities cited above show that the writer of this phrase was speaking figuratively. There is a prohibition against the federal courts interfering with state courts, but there are exceptions to the rule, which have grown up through the years as necessity and unusual situations have demanded relief. Yet it is generally realized that comity and orderly administration of justice in the great majority of cases demand that each court shall be allowed to carry on its functions without interference from the other.

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## FOUND!

Dicta is informed that a volume of Corpus Juris has been found, apparently *sans* owner and all clues. Any reader who feels he can establish his ownership to said volume should notify Dicta, at 802 Midland Savings Building. Dicta suggests that readers check their sets of Corpus Juris before claiming the above volume.

# AN OUTLINE FOR THE ADMINISTRATION OF AN ESTATE

*By Frazer Arnold of the Denver Bar*

WITH the modern complexities brought into most estates by taxation, the dispersion of investments in various securities and the location of property in various places, the following may prove of some value, as a reminder, to any one charged with the duty of executing the terms of a will or of administering the property of an intestate:

LOCATE AND READ WILL:

Ascertain burial instructions.
Confer with persons familiar with decedent's affairs.

SAFEGUARD ASSETS:

Take protective measures immediately following decedent's death and prior to appointment of Executor.
Properly insure and protect both real and personal property when necessary.
Become familiar with and protect decedent's business interests.
Notify banks, safe deposit companies and postoffice authorities of decedent's death.
Investigate books of account and papers.
Collect valuables and place in adequate vaults.

PROBATE:

A wholly judicial proceeding, consisting of citing and notifying requisite parties and establishing the statutory proof by the witnesses to admit the Will, resisting attempts to contest the probate.
Apply for temporary administration if delay of probate is apparent.
Petition for widow's allowance or support of orphan minor children.

ASSEMBLE ASSETS:

*Life insurance:* procure forms and collect.
*Cash:* obtain tax waivers and collect.

*Household and personal effects:* inventory; properly care for, sell or otherwise dispose of, under court order.

*Securities:* (1) If located in safe deposit box, remove in presence of inheritance tax appraiser. (2) If in custody of others, procure tax waivers and collect. (3) Liquidate indebtedness if held as collateral.

*Interest and dividends:* collect and safeguard.

*Business interests:* arrange for proper representation and adequate protection.

*Real estate:* Obtain title papers and abstracts; inspect and report on condition of property; learn status of taxes, mortgages against property and leases, arrange for management and collection of rents.

*Miscellaneous assets:* payments due decedent, interests in other estates or trusts present or future. Investigate. Determine correctness of accounts, adjust conflicting claims and liquidate.

APPRAISAL: Establish values as of date of death.

*Consideration of assets:* Controlled by the testator's wishes as expressed in the Will and governed by the necessities of the estate, as follows:

*Household and Personal Effects:* Determine best time and method for disposal, with special consideration to valuable art collections, antiques, etc.

*Securities:* Examine desirability of investments. Determine propriety of holding or selling, with due regard to: (a) investment powers in will, (b) market conditions, (c) wise diversification of holdings, (d) results of statistical research, (e) consultations with persons well informed in particular field, (f) taxation, state and federal, (g) ultimate disposition of estate.

*Business Interests:* Exhaustive investigation, aided by bond houses, trust companies, etc. Reach policy as to continuance, sale or liquidation of business after securing best information in particular field, having due regard to testator's wishes and ultimate disposition of estate.

*Real Estate:* Investigate leases, encumbrances, condition of buildings, rental revenue, location, neighborhood, probable developments. If sale desirable, list for submission of offers.

CLAIMS:

(a) Notice required by law, (b) Obtaining proper verification, (c) Rejection of improper claims.

*Nature of Claims Encountered:* (a) Bills for current expenses, (b) For taxes or readjustments thereof, (c) Unmatured subscriptions, pledges, (d) Liability as fiduciary, (e) Family settlements, (f) Liability as endorser or maker of notes, surety on bonds, etc., (g) Liability as special partner or under unusual business contracts or leases.

TAXES:

Assessment and payment of modern tax liability is highly technical. Special forms for information and return must be prepared and filed for the respective taxing authorities.

*Income Taxes:*

(a) Income before death:

(1) File necessary returns; (2) make final settlement with tax authorities for all prior years; (3) defend all improper assessments.

(b) Income of Estate:

Arrange for distributions of income, payment of legacies and inheritance taxes and sale of securities in the interest of economy; file necessary returns and pay taxes.

*Inheritance Taxes:*

(a) State of domicile:

(1) Obtain waivers for transfer of securities and valuable deposits; (2) push proceedings for fixing tax; (3) adjust final tax payment; (4) pay promptly to obtain discount.

(b) Foreign States:

Push proceedings for tax payment to release affected securities for transfer.

(c) Federal Estate:

(1) File preliminary notice; (2) make return and pay tax; (3) have final adjustment after review and audit.

SETTLEMENT OF ESTATE:

*Payment of Legacies:* (a) Learn whether any assignments on file, (b) Pay legacies and deliver specific bequests, (c) Procure final receipt and release from legatees, (d) Pay expenses and administration costs and fees.

*Establishment of Trust Funds:* (a) Set aside securities or cash to constitute corpus of trust, (b) Adjust income due trust fund and provide for its payment, (c) Arrange for regular remittances to beneficiaries.

*Review and Audit of the Administration—Accounting:* A detailed statement of the acts and accounts of the executor or administrator is prepared and submitted to the interested beneficiaries and then filed in the County or probate Court for judicial settlement. Upon ratification by parties in interest and by court decree, the balance remaining in the hands of the personal representative is paid to the residuary legatees or heirs, as the case may be, and their receipts therefor are taken and filed in court.

# A TALE OF A TITLE

*By Senator Charles S. Thomas of the Denver Bar*

IN the winter of 1877-8 two men, Fryer and Borden by name, discovered a deposit of Carbonate of Lead ore rich in silver on a modest hillock just northeast of the little town of Leadville. They named the hill for Fryer, and their mining claim the New Discovery. The location of the Little Pittsburg, Winnemucca and Little Chief claims to the Eastward swiftly followed. All of them proved to be great properties, laid over the same deposit. The first two covered practically the same ground, and a battle was summarily staged in the courts by the rival owners for the disputed area. The Winnemucca was owned by Bissell and associates, the Little Pittsburgh by Tabor and Rische. The latter sold his interest to Senator Chaffee during the ensuing summer.

The Fryer Hill Deposit, which proved to be one of the largest and richest bodies of Lead-Silver ores ever discovered, was, until developments proved otherwise, assumed to be a vein or lode, and since the New Discovery occupied the crest of the hill, it was supposed to cover the apex of the vein. If so, it would belong to Fryer and Borden throughout its depth. Hence, the Pittsburg owners and the Winnemucca owners were equally anxious to secure control of the New Discovery and to conceal the fact from the others. Each, therefore, began an active but stealthy campaign for the purchase of the New Discovery.

Neither Fryer nor Borden regarded their claim as of unusual value. Both were willing to sell for fifty thousand dollars each, but as there were few buyers at the time, the fact was not generally known. Fryer had no occupation, but called Denver his home. Borden was in the employ of Berdell and Witherell, who owned and operated a small smelting plant.

Soon after this situation developed, Senator Chaffee, meeting Fryer in Denver, purchased his half interest in the mine for $50,000, but gave the incident no publicity. Meanwhile, the Bissell interests sought to secure Borden's title by requesting Nelson Hallock, one of his intimate friends, to conduct the negotiation. Hallock promptly visited the smelter

for this purpose. But Borden happened at the time to be in Denver. Berdell, guessing Hallock's purpose, which the latter admitted, informed Hallock that he was Borden's closest friend, hence he could make a better bargain with him than any one, and would be delighted to do so; that the only compensation he wanted or expected would be the privilege of purchasing the ore mined from the claim at current market rates for treatment. Hallock reported this suggestion to his principals, who authorized him to accept it, which he did.

At this point in the narrative of events, some reference to the character of Leadville's communications with the outside world is desirable. All freight was hauled in and out by wagon from the terminus of the South Park railway then at Baileys, about 40 miles from Denver. The nearest telegraph office was at Fairplay, 20 miles away via Mosquito Trail and sixty miles by road. A stage line for passengers and mail operated from the rail head stopping over night at Fairplay. The schedule time to and from Denver was, therefore, 36 hours. Granite, then the County Seat of Lake County, was 18 miles distant from Leadville.

When Borden returned, Berdell negotiated a purchase of his half of the New Discovery on his own account. A deed was duly executed to him for fifty thousand dollars, for which Berdell executed five notes for ten thousand dollars each payable every thirty days thereafter. These, with the deed, were mailed to the First National Bank of Denver, to be held in escrow under the terms of the agreement.

This done, Berdell, who knew of Chaffee's purchase of the Fryer interest, reported the transaction to Bissell, and demanded one-eighth of the Borden half as a commission for his services. Bissell hotly rejected the proposal and denounced Berdell in genuine western fashion. Berdell rejoined by notifying Bissell that unless his terms were accepted within thirty days he would offer the interest to Chaffee who would, of course, take it over.

The Berdell Smelter was located just out of town and directly upon the stage route. Two mornings afterwards Berdell thought he saw George W. Trimble, one of Bissell's associates, in the outgoing stage as it passed his office. He instantly concluded that Trimble was en route to Denver to take up the

escrow, or otherwise to forestall the Berdell ultimatum. Berdell therefore, saddled his horse and took the Mosquito Trail to Fairplay. He arrived hours ahead of the stage. When it drove up to the hotel Berdell, from the side of an adjoining structure, saw Trimble leave the coach and enter the hotel. Next morning he saw Trimble take the coach for Denver. During the day he sent a confidential wire to the Cashier of the Denver Bank, saying that he had concluded to pay the Borden notes and obtain the deed attached to them at once; that his agent had left on the morning stage and would attend to the matter on arrival. As soon as the transaction was closed, would the Cashier please notify him by wire with particulars?

During the course of the next day Berdell received the requested telegram informing him that Mr. Trimble had lifted the notes and received the deed just as Berdell had advised. Thereupon Berdell returned to Leadville. On the same evening after reaching home he showed Borden the telegram, giving him some explanation for the turn which affairs had taken. He added that it was very important to him that the conveyance should be on record the next day, and would Mr. Borden kindly execute to him a duplicate conveyance that he might send it right away to Granite. The unsuspecting Mr. Borden would and did, whereupon Mr. Berdell dispatched a "pony expressman" forthwith to the County Seat with the deed and with instructions to have it recorded and return with it the next morning. His orders were obeyed, and with the deed in his possession, Mr. Berdell awaited an early call from Dr. Bissell. He did not wait until his patience was exhausted; for Mr. Trimble lost no time in returning from Denver. Thereupon, Bissell, armed with the escrow deed and the Berdell notes, invaded the Berdell office, informed that gentleman of the Denver transaction, and demanded an immediate conveyance of the Borden interest in the New Discovery mine. Should Berdell refuse, suit in attachment would be instituted upon his notes, which had been indorsed by the Bank to Mr. Trimble.

Berdell then disclosed his hand. He showed Bissell his recorded deed, told Bissell how and why he had secured it and countered by demanding a sixteenth interest in the mine and a surrender of the notes or he would sell and convey the half

interest to the Chaffee people. This was a knockout for Bissell. He retired for consultation and reinforcements. He finally surrendered after several parleys. Berdell insisted that compliance with his demand should be a final settlement of all differences, to which Bissell yielded under protest.

The value of Berdells sixteenth was prodigious. Should he sell to Chaffee, the latter would have control. Should Bissell obtain it he would be on a par with Chaffee. So Berdell played the contending parties against each other until they compromised their differences before concluding which, Chaffee, with Bissell's approval, made a final offer to Berdell, with the warning that he could take it or leave it. He took it. What the amount was I never knew. For Berdell, still with an eye to the windward, insisted that the ostensible sum to be paid for the sixteenth interest should be $4000 and no more. To effectuate this he dumped a lot of chips and whetstones on Chaffee to represent the ostensible consideration for the principal part of the moneys paid him.

Shortly afterwards, the Bissell people brought suit against Berdell to recover the value of the sixteenth interest, which, as I recall, was fixed at fifty thousand dollars. Berdell countered with a denial of the alleged facts, and pleaded his $4000 sale as the actual value of the interest. At the trial all the facts above detailed were proven, while defendant stressed the finality of the settlement as a complete bar to the suit. The jury returned a verdict for $4000 from which both sides appealed. The Supreme Court affirmed the judgment, but reversed the law of final settlement, by accepting the negative testimony of the plaintiffs upon the subject. This was just, whatever the rule of the law. Those who care to read the case will find it reported as Bissell vs. Berdell 6 Colo. 160. The final result was followed by a passage at arms in Leadville between Berdell and a man named Foss; but that is another story. The reader will draw his own conclusion as to the moral involved in the transaction, if any there be.

# RECENT TRIAL COURT DECISIONS

(EDITOR'S NOTE: It is intended in each issue of Dicta to note interesting decisions of the United States Circuit Court of Appeals for the new Tenth Circuit, although such are not trial decisions, the United States District Court, the Denver District Court, the County Court, and occasionally the Juvenile Court.)

UNITED STATES CIRCUIT COURT OF APPEALS—10th CIRCUIT—
*Oregon Lumber Company vs. M. Terasaki, et al.*

Appeal from the United States District Court for the District of Colorado. Decided January 4, 1930. Opinion by Judge Phillips.

*Facts.*—Ben Bolt Jr. Floral Company, bankrupt, entered into a contract to purchase from Terasaki and Kaii three acres of land in Adams County, Colorado, for $4,000. $500.00 in cash was paid on said purchase price. Under the terms of the contract the sellers retain title to the property until paid in full. Contract also contained the usual standard provision regarding forfeiture, etc. The contract was recorded. The bankrupt immediately entered into possession of the premises and made certain improvements thereon. The Oregon Lumber Company furnished materials for a new house erected on the premises and filed their claim on the entire 3-acre tract and all improvements for $2231.90 and requested a lien therefor. The Stearns-Roger Manufacturing Company, one of the defendants above, furnished materials for a new boiler and fittings for the greenhouse already standing on the premises, and filed their claim for $1965.00 against the improvements as an "entire structure." When the purchaser became a bankrupt, Terasaki and Kaii abandoned their claim of forfeiture under the contract and filed claim of lien for $3500.00 plus interest on account of the unpaid purchase price against the entire property. In the proceedings to review an order of the referee in bankruptcy, the District Court entered the following order:

1. That Terasaki and Kaii be given a prior lien on the premises for the amount of the unpaid purchase price under the contract plus interest.

2. That the Oregon Lumber Company be given a lien against the 3 acres and all improvements thereon as a unit subject to above lien.

3. That the Stearns-Roger Manufacturing Company be given a lien against the boiler and heating plant installed by them and be permitted to remove the same.

The Oregon Lumber Company appealed said order to the Circuit Court of Appeals on the theory that Terasaki and Kaii had an "interest in the land" rather than a "recorded mortgage," and failing to give five days notice after knowledge of the improvements as provided in Section 6446 C. L. Colo. 1921, had no prior claim.

*Held.*—1. That a Court of bankruptcy is a court of equity and is governed by the principles and rules of equity jurisprudence.

2. A contract of sale vests equitable title to the property in the purchaser from the date of execution, and that the vendor is a trustee of the legal title for the vendee, and the vendee in turn is trustee of the purchase money for vendor. The vendor therefore retains the legal title but only as security for the purchase price. The vendor may therefore assert a lien in a court of equity (in this instance a court of bankruptcy), and such lien is a *bona fide,* recorded encumbrance under the meaning of the provisions of Section 6446 C. L. Colo. 1921.

3. The heating plant installed by the Stearns-Roger Manufacturing Company is not an "entire structure" under the meaning of Section 6444 C. L. 1921, but is an integral part of the greenhouse. The order of the District Court is therefore affirmed as it pertains to the liens of Terasaki and Kaii and the Lumber Company, but modified to give the Stearns-Roger Manufacturing Company only a lien equal to that of the Lumber Company on the entire 3 acres and improvements as a unit.

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UNITED STATES CIRCUIT COURT OF APPEALS—10th CIRCUIT—
*Consolidated Lead & Zinc Company vs. Karl Corcaral.*

Appeal from the District Court for the North District of Oklahoma. Decided January 6, 1930. Opinion by Judge Cotteral.

*Facts.*—Plaintiff, a minor, suing by his next friend, resided at Picher, Oklahoma. Defendant Zinc Company operated a mine and mill at said town. The premises of the Zinc Company were a block north of the high school and adjoined a public road traveled by many people and used daily by school children. On the premises was a transformer house near and in plain view of the road. There was no fence

around said house nor did the Company maintain any guard. The front and side doors were usually open. It was alleged in the complaint that this transformer house was attractive and easily accessible to children exciting their curiosity and interest, and without notice it carried a dangerous charge of electricity. Plaintiff and other boys for months had used the mine grounds as a play ground.

On the day of the accident, plaintiff with another boy had been playing on the premises. It was alleged and the evidence showed that the other boy had turned on the switch in the transformer house; that during a friendly scuffle in the transformer house, plaintiff fell on the floor and came in contact with an uninsulated live wire on the floor. As a result he was severely burned and both his arms were amputated.

A judgment for $15,000 was entered on a verdict for the plaintiff. Defendant Zinc Company appealed to the Circuit Court of Appeals principally on the theory:

1. That demurrer should have been sustained to the complaint.

2. Improper instructions.

*Held.*—1. The demurrer was properly overruled. This case is not like United Zinc Company vs. Britt (poisonous pool) but is more like Railroad Company vs. Stout (turn table) and Union Pacific Railway vs. McDonald (burning slack).

The complaint alleged and the evidence showed an habitual use of the premises as a play ground. The Company knew or might have known of this fact and the plaintiff therefore must be treated as a licensee. Being a licensee the Company owed him a duty of protection against a danger unknown to him and to which he might be attracted. This danger was known to the Company and they could reasonably have anticipated injury.

In the petition the injury is attributed to defendant's negligence, and it would be a fact for the jury to decide if the resulting injury was the proximate and reasonable consequence of that negligence and could have reasonably been foreseen by the Company.

2. The case reversed and remanded on the instructions given because they were too broad.

# COLORADO SUPREME COURT DECISIONS

(EDITOR'S NOTE.—It is intended in each issue of DICTA to print brief abstracts of the decisions of the Supreme Court. These abstracts will be printed only after the time within which a petition for rehearing may be filed has elapsed without such action being taken, or in the event that a petition for rehearing has been filed the abstract will be printed only after the petition has been disposed of.)

CORPORATIONS — DIRECTORS — PREFERRED CREDITORS—SUCCESSORS—NO. 11998—*Beaver Park Co. vs. Hobson—Decided December 2, 1929.*

*Facts.*—Beaver Park Co. was organized to take over a former land company and an irrigation company, after the Pueblo flood had destroyed the irrigation system and the companies were without funds to proceed. Penrose, a director, loaned money to the company to perform the work, after the company had tried to raise money without success. Certain land owners had brought suit and obtained judgments against the former water company for damages and sought to hold the new company as successor of the old company and to have their judgments declared superior liens to that of Penrose for moneys he advanced and for which he took security from the company.

*Held.*—An officer of a corporation, in the absence of bad faith or fraud, has the same right to become its creditor, preferred or otherwise, as one who has no official connection therewith. The Beaver Park Company was not a continuation of, or reincarnation of, the old company and there being a consideration for the transfer of the assets from the old company to the new and no fraud nor merger nor consolidation, the new company cannot be held for the debts of the old company.

*Judgment Reversed.*

FORECLOSURE — PRIORITY — UNMATURED INTEREST — NO. 12154—*Toll vs. Colorado National Bank, et al—Decided December 23, 1929.*

*Facts.*—The Twin Lakes Land and Water Company executed a deed of trust to which were attached interest coupons paying 6 per cent. interest. At the same time they executed a series of 1 per cent interest coupons which were not attached

to the principal note. The original note and deed of trust with the coupons attached became the property of the Colorado National Bank and the 1 per cent interest coupons which were detached came into the possession of Toll as trustee.

*Held.*—First, in the absence of an agreement or a special equity to the contrary, assignees holding separately several notes secured by a mortgage or otherwise are entitled to share *pro rata* and without any preference in the proceeds arising from the sale of the securities, when insufficient to satisfy them all, and this is true if all the notes matured on different dates, and the assignments were made at different times. Second, Toll was not entitled to *pro rate* to the extent of his interest coupons that had not yet matured.

*Judgment Affirmed and Modified.*

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INTOXICATING LIQUORS — AUTOMOBILES—FORFEITURE—NO. 12199—*Lindsley vs. Werner—Decided December 23, 1929.*

*Facts.*—Lindsley sold an automobile to Walling. The purchaser did not pay the entire purchase price, but gave back a mortgage. The mortgage contained a covenant against the use of the car in violation of the Federal or State intoxicating liquor laws. Thereafter, while the car contained intoxicating liquors, an officer seized the same and was proceeding to forfeit the car under the intoxicating liquor statutes, and the mortgagee, who was innocent in the transaction, instituted suit in replevin against the officer .

*Held.*—While the automobile is used or kept for the purpose of violating the provisions of the intoxicating liquor act, it can be forfeited to the State, notwithstanding that there is a chattel mortgage against it and the mortgagee was innocent and had no knowledge of the use to which the car was being put.*

*Judgment Affirmed.* ————

MECHANICS' LIENS—CONTRACTORS' BONDS—SUBROGATION—ESTOPPEL—NO. 11906—*Howard vs. Fisher—Decided December 9, 1929.*

*Facts.*—Howard owned five lots which she mortgaged to The Colorado Mortgage Company. Thereafter she hired

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*EDITOR'S QUAERE: Would this be true if the mortgagee was not a party to the action and was never notified of the seizure?

Brendle and Brent to build an apartment house on them, and they gave a contractors' bond with The National Surety Company as surety. Brendle and Brent defaulted and the Surety Company undertook the work, which it continued for a time, then dropped. It paid certain mechanics' lien claimants and assignments of their liens were taken in the name of Smith, the Surety Company's Vice-President. After work had been begun the Midland Company paid off the Mortgage Company's loan and took a new mortgage; after suit had been started one Auslender bought Howard's interest in the property, but the trial Court refused to make Auslender a party.

*Held.*—The Surety Company was estopped to assert the claims under the assignments of the mechanic's lien. The Midland Company's loan is inferior to the mechanic's lien claims, but it is entitled to the protection of the contractor's bond. Auslender should have been made a party to the proceedings.

*Judgment Affirmed in Part and Revised in Part.*

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MUNICIPAL CORPORATION—ORDINANCE—FORTUNE TELLERS —No. 12496—*Watson vs. City of Denver—Decided December 23, 1929.*

*Facts.*—Watson was charged with the violation of section 1202 of the Municipal Code of Denver, was found guilty and was fined. She appealed to the County Court where she was again found guilty and fined apparently on the theory that she was a fortune teller without having procured a license. The complaint against her was that she violated Section 1202. Section 1202 defined fortune tellers and clairvoyants but contained no penalty.

*Held.*—Section 1202 of the Municipal Code creates no offense. The complaint states no offense. The verdict found Helen Watson guilty of no offense. Hence the judgment cannot stand.

*Judgment Reversed.*

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RECEIVERSHIP—LACK OF PROOF—NO. 12264—*Kochiovelos vs. Kochiovelos Live Stock Co. et al.—Decided December 16, 1929.*

*Facts.*—This was a suit by one brother against another

and a company seeking the appointment of a receiver of the corporate property, a dissolution of the corporation, a disposition of the assets of the company and for an accounting. Judgment below was rendered for the defendant.

*Held.*—The evidence failed to sustain the plaintiff's allegations for receivership and accounting.

*Judgment Affirmed.*

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REPLEVIN — CONFLICTING EVIDENCE — NO. 12260 — *Kritzmanich vs. Spehar, Administrator—Decided December 16, 1929.*

*Facts.*—The administrator brought an action in replevin in the District Court to recover certain cattle, horses, and miscellaneous farm equipment. Defendants were the two eldest of five sons of the deceased. The sole issue involved was whether the personal property was owned by the deceased at the time of his death, or by the defendants. There was conflicting evidence, and the trial court entered judgment for possession for the plaintiff.

*Held.*—On the question of possession or ownership, the evidence was conflicting, and there was sufficient, proper, substantial, and credible evidence from which the Court had the right to determine that the property involved in this suit was all owned by the deceased. Judgment of the trial court based upon such evidence will not be disturbed by this court.

*Judgment Affirmed.*

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WILLS—CONTEST—FORMER ADJUDICATION—NO. 12446—*In re Last Will of Schmidt, Deceased, et al. vs. Dillingham—Decided December 16, 1929.*

*Facts.*—A beneficiary under the will sought to have it admitted to probate. Dillingham contested its provisions. Proponent demurred and the Court sustained the demurrer. Contestant elected to stand and appealed to the Supreme Court, which reversed the case, with directions to overrule the demurrer. The case went back, the trial court overruled the demurrer, and on motion, later struck out the answer on the ground that the matters set forth in the answer had been fully adjudicated by the Supreme Court in the former appeal.

*Held.*—For the lower Court to strike an answer without giving an opportunity to amend was a drastic action; but in this particular case, the answer consisted of a repetition of pleas formerly made and already adjudicated, and under such circumstances the Court did not err in adopting such drastic action.

*Judgment Affirmed.*

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WORKMEN'S COMPENSATION—CASUAL EMPLOYEES—NOTICE OF CLAIM—NO. 12320—*Comerford vs. Carr et al.—Decided January 6, 1930.*

*Facts.*—Comerford, the employer, was engaged in a rendering business and Carr the employee, testified that he was hurt while working for Comerford, that he ran a stone into his hand and was poisoned. The employer at different times had more than four employees working for him but they were not doing the same work, as Carr the injured employee was engaged in loading cars. Carr was awarded compensation.

*Held.*—(1) Carr was not required to file notice claiming compensation because he was paid compensation during the time he was off work. (2) He was injured in the course of his employment. (3) Comerford had more than four employees working for him. (4) The other employees were not casual employees because they were employed in the usual course of trade of the employer. (5) These other employees were engaged in a common employment. The mere fact that they were engaged in loading the cars was not a different employment. This was necessary for the conduct of the employer's business.

*Judgment Affirmed.*